Supreme Court, U.S.
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No. 10-

In the Supreme Court of the United States

SHAWN R. WENETA,
PETITIONER,

v.

WARDEN, LAWRENCEVILLE CORRECTIONAL
RESPONDENT.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Jefferson v. Upton*, 130 S. Ct. 2217, 2223 (2010), this Court noted that it has not considered the lawfulness of the practice where a judge adopts findings prepared by a litigant and those findings contain internal evidence suggesting that the judge may not have read them.

This Court should grant certiorari in this case to determine whether it is a violation of due process for a state habeas court to adopt *in toto* findings of fact and conclusions of law prepared by the prevailing party that contain a) internal evidence clearly indicating that the judge has not read them; and b) mistakes that preclude relief that otherwise would have been available.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court of Arlington County Order denying Weneta's habeas petition may be found at *Weneta v. Warden*, No. 08-1305 (June 19, 2009). App. 1a.[1] The Supreme Court of Virginia Order refusing Weneta's petition for appeal can be found at *Weneta v. Warden*, No. 091920 (June 3, 2010), App. 27a. The Supreme Court of Virginia Order denying Weneta's Petition for Rehearing can be found at *Weneta v. Warden*, No. 091920 (Sept. 24, 2010), App. 28a.

JURISDICTION

The date of the judgment to be reviewed is June 19, 2009 and June 3, 2010. The Supreme Court of Virginia denied review of the circuit court's decision, and then denied rehearing on September 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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[1] The Appendix to this petition is cited to as "App." The appendix to Weneta's state habeas petition is not included, but is available to be lodged via email upon request. The state habeas appendix will be cited to as "State App." Likewise the sentencing transcripts are not included, but will be cited to as "Tr." and are also available to be lodged.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part as follows: In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides as follows: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows: [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Shawn Weneta pled guilty to three counts of embezzlement and a failure to appear charge, crimes that had a median sentencing guideline of less than four years.[2] The trial court referred Weneta for evaluation for alternative sentencing prior to the sentencing hearing, and the probation officer prepared a pre-sentence investigation report (hereinafter "PSI").

In that PSI report, Weneta explained that a primary cause for the embezzlement was the stress and cost of caring for his mother, who was dying (and subsequently died) from cancer. Weneta's counsel failed to respond to Weneta's specific written requests to prepare for sentencing. At the sentencing, the prosecution called Weneta's family members and others, who contradicted several assertions of Weneta's in the PSI. Trial counsel thus asked for a continuance to obtain Weneta's witnesses. At the reconvened hearing trial counsel again had failed to contact virtually all of Weneta's witnesses despite multiple written requests by Weneta to do so. Facing a second sentencing hearing at which Weneta had no witnesses, the trial court sentenced Weneta to the maximum on all charges – 25 years in total.

Weneta filed a habeas petition in the circuit court with affidavits from six of Weneta's witnesses, who said that they would have come to sentencing if notified in advance, and they provided facts that would have rebutted the prosecutor's witnesses' false

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[2] Virginia uses voluntary sentencing guidelines as a tool to assist the judge in fixing an appropriate punishment. *Belcher v. Commonwealth*, 435 S.E.2d 160, 161 (Va. Ct. App. 1993).

assertions. The Warden responded, disputing the truth of Weneta's witnesses' statements.

The Warden's response included several blatant mistakes, including that Weneta received a 13-year sentence (he indisputably received 25-years), and that the legal standard for relief was that Weneta must show that "he would not have pled guilty." (Weneta's claim was that trial counsel's performance at sentencing was deficient, and that he was prejudiced by receiving an excessive sentence – not that he would not have pled guilty). Weneta filed a reply pointing out these blatant mistakes.

The Warden then filed a 26-page proposed final order that contained those very same blatant mistakes, as well as containing the Warden's version of disputed facts. Weneta objected, noting that a habeas court cannot find disputed facts in favor of the moving party unless it holds a hearing, and requested an evidentiary hearing and described in detail twenty-two of the disputed facts. Nevertheless, in violation of Weneta's Fourteenth Amendment due process rights and Eighth Amendment right to a reliable sentencing hearing, the circuit court signed the Warden's proposed final order *in toto* without making a single change, and never ruled on Weneta's request for a hearing.

STATEMENT OF FACTS

The Guilty Plea

Shawn Weneta was charged with three counts of embezzlement pursuant to Va. Code § 18.2-111 and one count of failure to appear pursuant to Va. Code § 19.2-128. The court appointed counsel to

represent Weneta. Weneta pled guilty to all counts on November 9, 2005. Indicating that the court was considering Weneta for a sentence other than active incarceration, the trial court ordered that Weneta be evaluated for alternative sentencing, and that probation prepare a PSI.

The Sentencing

On December 19, 2005, the prosecution wrote to trial counsel, providing a copy of a letter from Weneta's uncle, Michael Boyd, that accused Shawn Weneta of numerous unadjudicated acts. State App. 38-40. Over the next seven months Weneta wrote three letters to counsel that refuted most of the uncle's allegations, provided names of sentencing witnesses, and asked counsel to meet with him. State App. 23-26, 33-36. Prior to the sentencing hearing Weneta contacted the court to find out who counsel had subpoenaed for the sentencing hearing in this case because he had not heard from his counsel. The court told him that he had to look at his case file. So Weneta asked trial counsel who was subpoenaed, but never received an answer.

The First Sentencing Hearing

At the July 28, 2006, sentencing hearing counsel had obtained no witnesses for Weneta despite Weneta's written requests and many phone calls. The PSI indicated that the sentencing guidelines in this case called for a low end of two years and three months and a high end of five years and eight months, and included statements Weneta made to the probation officer regarding his caring for

his terminally ill mother during the time of his embezzlement.

The prosecutor called Shawn Weneta's brother, Michael Weneta, who testified, in substance, that Shawn Weneta did not spend much, if any, time caring for his mother during her terminal illness and that he instead stole from her and committed other bad acts. Michael Weneta did not testify to any facts regarding the crimes for which Shawn Weneta pled guilty.

Defense counsel moved for a continuance to bring witnesses in support of Weneta. The court was clearly frustrated and dubious of the request for a continuance, stating it wanted "to give [the defendant] every opportunity to explain what I just heard . . . I want to hear all – I want to give him every opportunity to allocute and mitigate in any way, shape, or form he thinks necessary because it may have a bearing on the Court's sentence." The sentencing case was scheduled to resume October 20, 2006.

Weneta wrote to counsel and called him and left messages several times providing specific information on witnesses for sentencing and literally begging counsel to meet with him to prepare for sentencing. State App. 29, 31. On September 29 and October 13, 2006, Weneta wrote to the circuit court asking for a continuance because he had called his attorney three times a day virtually every day and still had not heard from his attorney. State App. 27-29. Weneta never heard from the court and there was no ruling on his *pro se* motions for a continuance.

The Second Sentencing Hearing

At the October 20, 2006, reconvened hearing Weneta's attorney surprised everyone, including Weneta, by having no witnesses to present. The prosecutor stated that "[m]y thought was that since we reconvened for the defense to put on evidence, that he would do that . . . ." The circuit court asked "do you have any evidence to present?" Weneta's attorney responded that he had no evidence.

The prosecutor, as she had stated she would do at the first hearing, called Shawn Weneta's uncle, Michael Boyd, as a witness to testify to numerous unadjudicated bad acts unrelated to Weneta's conviction. Defense counsel failed to object on relevance grounds and failed to rebut any of the Uncle's statements through either cross-examination or other witnesses, because trial counsel was unprepared.

The court then sentenced Weneta to the maximum sentence of twenty years on each of the three counts of embezzlement, to run concurrent with each other, and the maximum of five years on the one count of failure to appear in court to run consecutive with the embezzlement time. The Circuit Court wrote as its reason for its enormous departure from the sentencing guidelines that Weneta "is a career criminal who has escaped punishment his entire life. He has no remorse and is a serious danger to this community."

The State Habeas Petition

On October 27, 2008, Weneta filed a 27-page petition for a writ of habeas corpus in the Arlington County Circuit Court, before the same judge who sentenced Weneta as required by Va. Code § 8.01-654(B)(1). Weneta raised many new facts outside of the trial record, including affidavits from six witnesses whom Weneta had asked trial counsel to contact for sentencing. Four of the witnesses stated that they were never contacted by counsel, but would have come to the sentencing if contacted. One witness from New Jersey said she was contacted only a couple days before the sentencing, and thus had insufficient notice to obtain time off work. The sixth witness said she would have come if trial counsel had helped her. Weneta also presented mental health records, the same records he had asked trial counsel in writing to provide at sentencing, which both provided mitigating evidence and a motive for Weneta's uncle to have testified against him. Weneta also provided financial documents that rebutted allegations of the prosecutor's witnesses.

The witnesses and evidence rebutted the prosecutor's aggravating facts at sentencing. Weneta raised as his legal ground the ineffective assistance of counsel (hereinafter "IAC") at the sentencing hearings, and argued that he was prejudiced by a longer sentence than he otherwise would have received because of trial counsel's deficient performance.

On February 10, 2009, the Warden filed a 30-page motion to dismiss, disputing many of the facts

that Weneta raised. The Warden's response included blatant mistakes such as that Weneta received a 13-year sentence (he received 25-years), and that the legal standard for relief was that Weneta must show that "he would not have pled guilty." (Weneta's IAC claim was that he was prejudiced by receiving an excessive sentence – not that he would not have pled guilty).

On April 15, 2009, Weneta filed a 17-page response, disputing many of the Warden's facts and pointing out the blatant mistakes in the Warden's pleading. On February 10, 2009 the Warden filed a 26-page proposed final order that included the blatant mistakes, as well as numerous typographical errors. Weneta objected to the order on its face because it found disputed facts in favor of the moving party. App. 32a. Weneta also filed contemporaneously with the proposed final order a motion for an evidentiary hearing, pointing out twenty-two facts that were in dispute that the Warden's proposed final order found in favor of the moving party. "Weneta's Opposition to the Warden's 'Final Order' and Motion for an Evidentiary Hearing" at 2-3. Regardless, the circuit court signed and entered the Warden's final order as proposed, including the blatant mistakes and typographical errors, App. 1a-34a, without making a single change and without ruling on Weneta's motion for an evidentiary hearing.

Weneta appealed the dismissal of his habeas petition to the Supreme Court of Virginia. On June 3, 2010, the court refused Weneta's petition for appeal. App. 34a. Weneta asked for rehearing, and on September 24, 2010, the court denied rehearing. App. 35a.

REASONS FOR GRANTING THE PETITION

The State Habeas Court Adopted in toto *findings of fact and conclusions of law prepared by the prevailing party that contain a) internal evidence clearly indicating that the judge has not read them; and b) mistakes that preclude relief that otherwise would have been available.*

The trial court violated Weneta's Fourteenth Amendment due process rights and Eighth Amendment right to a reliable sentencing hearing when it adopted and signed the Warden's 26-page proposed "final order," including findings of fact and conclusions of law, without making a single change to the order despite blatant material errors of fact and law.[3]

The Warden's proposed findings, as would be

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[3] Virginia Supreme Court Rule 3A:24, also provides that a Court make independent findings:

> Any Order of a circuit court denying a petition for a writ of habeas corpus shall include findings of fact and conclusions of law as required by Code § 8.01-654(B)(5). The order shall identify the substance of the claims asserted in the petition, and state the specific reason for the denial of each claim. Any such order may adopt a trial court's written opinion explaining its decision or a transcribed explanation of the court's ruling from the bench; however, an order shall not deny the petition without explanation, or rely upon incorporation by reference of a pleading filed in the case.

expected of a party to any litigation, did not contain a neutral recitation of the facts at issue. With a few minor exceptions, the Warden's proposed final order merely recited the prosecutor's version of the evidence as it stood at sentencing, without even acknowledging that the prosecutor's case had been severely undermined by Weneta's factual allegations in his habeas petition and response. While it is understandable why the Warden would prefer that the evidence remain frozen as it appeared to the trial court, Weneta demonstrated that the prosecutor's sentencing case created numerous false impressions, and often on irrelevant matters. Among the assertions that the court's order found in favor of the Warden, without a hearing, were these factual assertions for which their was not even a *factual dispute* because there was absolutely no record support:

1) ¶ 1 - the length of sentence was wrong – Weneta was sentenced to 25 years not 13 years. App. 1a.

2) ¶ 8 – Weneta moved out of his mother's house in Aug. 2003 (not in February 2003, App. 8a, so he obviously cared for mother for six months longer than the court thought). 2006-07-28 Tr. 17.

3) ¶ 40 – Weneta's mental health records did not include criminal conduct that was not already revealed to the court in Weneta's PSI. App. 21a.

4) ¶ 49 – Weneta's mother's illness was from September 2002 – March 2004 (not from Aug. 2003, App. 26a). 2006-07-28 Tr. 17.

5) ¶ 52 - Weneta did not travel to Illinois to visit friends in 2003, App. 27a, but in 2005 after his mother's death.

In addition, and most damningly, the Warden's order, that the court adopted contained an incorrect legal standard that Weneta could not have met. The Warden misstated in its motion to dismiss that Weneta can only win his IAC claim if he shows that he "would have insisted on going to trial" instead of pleading guilty. Motion to Dismiss ¶ 19. But Weneta never challenged his guilty plea or the voluntariness of his plea, but only his sentence. Weneta pointed out this blatant error in his reply. He could not have possibly met this standard, for a claim that he had not pled. Instead, Weneta had to show that counsel's performance was deficient, and there was a reasonable probability that the outcome of the proceeding – his sentence - would have been different. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (finding counsel ineffective during the sentencing phase); *Veal v. United States*, 486 F. Supp. 2d 564, 567 (N.D. W. Va. 2007) (counsel ineffective in sentencing following guilty plea for, *inter alia*, failing to review the pre-sentence report). Nevertheless, the Warden kept that incorrect standard in its proposed order, which the trial court adopted. Paragraph 18 of the trial court's order dismissing Weneta's habeas petition recites the IAC

standard as Weneta having to prove that he "would not have pleaded guilty" but for counsel's errors.

By simply signing off on the Warden's proposed findings, and wholly ignoring the basis for Weneta's habeas petition, the circuit court also failed to resolve numerous contested issues of material fact critical to the disposition of the petition. Courts have long condemned the practice of "verbatim adoption of findings of fact prepared by prevailing parties" as an abdication of responsibility by the assigned fact-finder and a disservice to reviewing courts. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964). This interpretation is in accord with the federal courts, many state courts, and numerous commentators.

More recently, this Court has written that "[a]lthough we have stated that a court's "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court, we have also criticized that practice. *Anderson*, 470 U.S., at 572 . . . . And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them." *Jefferson v. Upton*, 130 S. Ct. 2217, 2223 (2010).

Other courts have also struggled with the constitutional implications of the various circumstances where the trial court has made

findings that were less than independent.[4]

The state habeas court in this case adopted at least five findings of fact for which there was no support in the record, and each fact-finding is clearly incorrect. The state habeas court also made numerous other findings of fact against the non-moving party for which there was a factual dispute in the record. Most harmful to Weneta was that the state habeas court made an erroneous legal conclusion that precluded relief for Weneta. All

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[4] *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985); *Maljack Productions, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9th Cir. 1996) (remanding the case for findings and reassigning the case to a new judge, noting the 'regrettable practice' of adopting the findings drafted by the prevailing party wholesale) (*quoting Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n.3 (9th Cir. 1984)); *FMC Corp. v. Varco Internat'l*, 677 F.2d 500, 501 n.2 (5th Cir. 1982) (noting that "[w]e have consistently expressed our disapproval of the practice of unconditionally adopting findings submitted by one of the parties to a litigation"); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458-59 (4th Cir. 1984) (citing cases); *Ramey Construction Co. v. Apache Tribe*, 616 F.2d 464, 466-69 (10th Cir. 1980); *Tyler v. Swenson*, 427 F.2d 412 (8th Cir. 1970); *Holbrook v. Institutional Insurance Co.*, 369 F.2d 236 (7th Cir. 1966); *Roberts v. Ross*, 344 F.2d 747, 750-752 (3rd Cir. 1965); Card v. State, 652 So.2d 344 (Fla. 1995) (remanding for evidentiary hearing to determine whether the trial court "abdicated [its] sentencing responsibility to the prosecution, depriving [Appellant] of an independent weighing of the aggravating and mitigating circumstances during the sentencing phase of his trial," by signing sentencing order drafted by the prosecution); *Phillips v. Phillips*, 464 P.2d 876, 878 (Colo. 1970); *Kentucky Milk Marketing & Anti- Monopoly Comm'n v. Borden Co.*, 456 S.W.2d 831, 834-35 (Ky. 1969); Krupp v. Krupp, 236 A.2d 653 (Vt. 1967); *Nashville, C. & S. L. Ry. v. Price*, 148 S.W. 219 (Tenn. 1911); *see generally, Annotation, Propriety and Effect of Trial Court's Adoption of Findings Prepared by Prevailing Party*, 54 A.L.R.3d 868.

these errors were the result of the state habeas court's adoption of the Warden's proposed order without a single change. It appears clear that the judge did not read the findings before he adopted them, because the very first paragraph had Weneta's sentence incorrectly as "13 years" instead of 25. Such a result cannot abide due process.

Weneta's Winning IAC Claim Was Precluded by the State Habeas Court's Adopting Erroneous Factual and Legal Findings

The testimony of the prosecution's sentencing witnesses was not relevant because they went far beyond the alleged purpose to rebut Shawn Weneta's statements in the PSI. Weneta's crime in this case and complete criminal history was set out in the PSI and taken into account by the sentencing guidelines. This is what should have been the focus of the sentencing hearing. *Merritt v. Commonwealth*, 528 S.E.2d 743, 744 (2000). What was improper and not part of Weneta's criminal history were the plethora of hearsay accusations of unadjudicated criminal conduct raised at the sentencing hearing and unvetted by the probation officer, and not effectively subject to the crucible of the adversarial process because trial counsel had not brought any witnesses to the hearing.

There can be little doubt that the testimony of the prosecutor's witnesses had a significant impact on the decision of the circuit court in this case, given that a) after Weneta's guilty plea and before the hearings, the trial court had referred Weneta for evaluation for alternative sentencing options; and b) the sentencing guidelines in this case called for a low

end of two years and three months and a high end of five years and eight months. In addition, the court *stated* that the testimony of the witnesses at the second sentencing hearing would impact his decision.

There must be a nexus between the statement of facts in the criminal case itself and the testimony elicited at sentencing and there was not a sufficient nexus in this case. It is notable that there was no testimony or evidence of any kind from the victim of the crimes.

Weneta asked trial counsel months before sentencing to call numerous witnesses on his behalf. Weneta wrote numerous letters to trial counsel prior to his sentencing hearing noting that counsel was not in communication with Weneta and asking that his witnesses be notified, interviewed and brought to court. And clearly witnesses were available and willing to testify. Trial counsel's performance was deficient for failing to call any witnesses to testify at the sentencing phase of Weneta's trial.

If asked to attend and testify at Weneta's sentencing, at least six witnesses would have been willing to come and could have rebutted significant aspects of the false and vengeful testimony of Weneta's family members.

And they would have described the prosecutor's witnesses, including Michael Boyd, as having a long-standing out-of-proportion vendetta against Weneta. And Weneta had asked trial counsel not just to interview each of these witnesses for his sentencing hearing, but to give them advanced notice to enable them to testify.

Trial counsel should have proffered to the circuit court the financial records included with

Weneta's state habeas petition to rebut the outrageous claim that he used his deceased father's credit for the purchase of a jeep. Counsel should have also proffered mental health records, because Weneta had asked counsel to do so prior to the sentencing and because they were extremely relevant and helpful in rebutting both the factual allegations and motives of the prosecutor's witnesses at sentencing.

Alone and cumulatively with the other sentencing phase errors and issues trial counsel's performance fell below the objectively reasonable range of professional performance. Cumulatively these errors provide an overwhelming case that Weneta's Sixth Amendment right was violated.

Weneta must show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel cannot make reasonable decisions without conducting a reasonable investigation. *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (finding counsel ineffective during the sentencing phase for failure to investigate when they failed to even look at the defendant's prior conviction).

Counsel could not have made a reasonable investigation in this case because he had not spoken with the witnesses. When the trial court asked counsel what his witnesses would say, counsel responded that "I'm not sure what they would say . . ." 2006-07-28 Tr. 35. And Weneta's petition makes obvious beyond peradventure that this is not "second-guessing" or using hindsight – all the things Weneta alleges that trial counsel should have done,

are the same things that Weneta told trial counsel in writing to do prior to sentencing. Failing to call witnesses at Weneta's sentencing fell below the standard expected of a trial attorney in these circumstances. And because the unrebutted evidence presented at the sentencing by the prosecutor caused the trial court to sentence Weneta to the maximum of twenty-five years, more than five- times the mid-point of the guidelines, when i) initially the court was considering alternative sentencing, and ii) the court stated that Weneta's witnesses would have a "bearing on the court's sentence," Weneta was clearly prejudiced. Weneta's IAC claim had no chance, however, because the state habeas court adopted erroneous fact findings and because Weneta could not have met the state habeas court's legal standard of showing that "he would not have pled guilty."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

SHAWN R. WENETA,
Petitioner,

v. Law No. 08-1305

WARDEN,
LAWRENCEVILLE CORRECTIONAL CENTER,
Respondent.

FINAL ORDER

Upon mature consideration of the petition of Shawn Weneta for a writ of habeas corpus, the motion of the respondent and the authorities cited therein, and a review of the record in the cases of Commonwealth v. Weneta, Case Nos. CR04-1008, CR04-1009, CR04-1010, and CR05-506, which are hereby made a part of the record in this matter, the Court finds:

1. The petitioner is in custody pursuant to the final order of this Court of October 26, 2006, wherein he was convicted of three counts of embezzlement and one count of failure to appear and sentenced to an active term of 13 years of imprisonment. (Case Nos. CR04-1008, CR04-1009, CR04-1010, and CR05-506).

2. Weneta filed a petition for appeal in the Court of Appeals in Virginia in which he challenged the publication of certain information in the presentence report and the admissibility of certain evidence. By order dated May 24, 2007, the Court of Appeals denied Weneta's petition, finding all but one of his claims procedurally defaulted. (Record No. 2872-06-4). Weneta did not pursue an appeal to the Virginia Supreme Court. Weneta was represented at trial and sentencing by Harry Dennis.

3. In his present habeas petition, Weneta, by counsel, attacks the validity of his convictions, alleging his attorney was ineffective for:

(a) Failing to object to the testimony of Michael Weneta based on the Commonwealth's alleged violation of Va. Code § 19.2-299;

(b) Failing to object to the testimony of Michael Weneta and Eve Butler-Gee as irrelevant;

(c) Failing to effectively impeach Michael Boyd;

(d) Failing to prepare for sentencing by contacting and calling witnesses:

(i) Chris Latta;
(ii) Danella Burnett;
(iii) Andrea LoMonaco;
(iv) Dani Alvestad;
(v) Jackie Ballew;
(vi) Johnny Moseley;
(vii) Michael Pedersen;

(viii) Kelly Miller; and
(ix) Kris Sampson;

(e) Failing to submit evidence from Weneta's doctor; and

(f) Failing to assist Weneta in preparing his statement to the trial court.

The Court finds these claims to be without merit.

FACTS

4. In April 2002, Weneta was sentenced in Fairfax County Circuit Court to five years of imprisonment and four years of probation for embezzlement. As conditions of his probation, Weneta was ordered to obtain mental health counseling and pay restitution. The Fairfax County Circuit Court suspended all but 15 months of that sentence and allowed Weneta to serve a portion of his sentence at home, at the request of his mother, Mary Ann, who was then dying of cancer.

5. Weneta began living with his mother in November 2002. Although expected to help with her care, he was unreliable, often being unavailable. As a result, his mother's friends and other family members worked to fill the void. Her son Matthew extended a leave of absence and stayed with her until February 2003 and her friends took turns assisting her and visiting with her. Moreover, Weneta quickly began stealing from his mother.

6. In February 2003, Weneta was released from custody and the ankle bracelet he had been required to wear was removed. Thereafter, Weneta was largely absent from his mother's home. In April 2003, Mary Ann and Michael Weneta, the petitioner's brother, caught Weneta stealing again. They warned him if he stole from his mother again, he would be asked to leave and would possibly face criminal charges. Weneta's mother had decided to give him one final chance because she knew she was dying and didn't want her youngest son to be in jail when she died.

7. In July 2003, Weneta began working for Coleman Powersports as the Human Resources Director. That same month, he began stealing from them. In August 2003, Weneta's family discovered that he had begun stealing form his mother again.

8. Michael Weneta, who had moved to Wisconsin in February 2003, flew to Virginia for the weekend and helped Mary Ann pack Weneta's belongings. Mary Ann then told Weneta to gather his belongings and leave immediately. From that point on, Weneta was not allowed to visit his mother in the absence of one of her other sons or one of her friends – who were by then on a 5 day a week, 24 hour a day rotation, sharing in her care. Mary Ann died seven months later, surrounded by friends and family. Weneta, however, was absent. During Mary Ann's last months, Weneta seldom visited.

9. Weneta was indicted for embezzlement on June 21, 2004. Coleman Powersports had discovered that, between July 7, 2003 and March 15, 2004,

Weneta had embezzled over $60,000 from them. Weneta was also arrested for violating his Fairfax County probation. Weneta's trial on instant embezzlement charges was set to begin March 23, 2005. On March 11, 2005, while incarcerated in Fairfax County, Weneta escaped and fled to Illinois. He was arrested outside Chicago on May 5, 2005, extradited, and returned to Virginia. On April 18, 2005, Weneta was indicted for failure to appear for his March 23, 2005, trial date in this Court.

10. On November 9, 2005, Weneta pled guilty to three counts of embezzlement and one count of failure to appear in exchange for the Commonwealth's promise not to pursue forgery and computer fraud charges related to his embezzlement from Coleman Powersports. Weneta was then referred to a probation officer.

11. Weneta reported to the probation officer and attempted to excuse his reprehensible behavior by invoking sympathy for his mother's tragic death. When asked his version of events, Weneta asserted he had been caring day and night for his dying mother while trying to maintain full-time employment. He claimed his mother did not have the money to pay her medical bills, which he said were very high, and that he took the money from his employer for that reason, with the intention of paying it all back when he could. Unfortunately for Weneta, the Deputy Assistant Commonwealth Attorney assigned to his sentencing, Theophani Stamos, inadvertently discovered Weneta's duplicity when his brother Michael called to discuss the sentencing with her. As a result, Stamos called

Michael and one of his mother's caregivers, Eve Butler-Gee, to testify at sentencing and Weneta's lies were exposed to the Court.

12. Hearing the testimony of Michael and Butler-Gee, Weneta asked for a continuance so he could obtain witnesses to show he did take care of his mother. The Commonwealth then asked that Michael Boyd, Weneta's uncle, be permitted to testify at the next hearing, if the Court granted Weneta's motion. Boyd had written a letter to the probation officer detailing many of Weneta's past indiscretions and asking for a lengthy sentence, but the Court had refused to consider the letter, finding to do so would have violated Weneta's right to confrontation. The Court granted Weneta's motion for a continuance and the Commonwealth's motion to permit Boyd to testify.

13. Realizing Boyd's testimony could be highly damaging to Weneta, his attorney, Harry Dennis, offered to waive further witnesses and complete the sentencing, but the Court declined this offer. Weneta's sentencing hearing was continued to October 20, 2006.

14. At Weneta's second sentencing hearing, his attorney presented letters of recommendation from several of Weneta's friends. The Commonwealth asked the Court to reconsider its earlier ruling refusing to consider Boyd's letter. The Court agreed and read the letter. Weneta then called Boyd as a witness and cross-examined him as to the content of the letter and his relationship with Weneta.

15. Finally, after considering the evidence and the argument of counsel, the Court sentenced Weneta. In doing so, the Court noted Weneta's 15 year criminal history, which included 22 theft charges, breaking and entering, and arson. The Court, stating its confidence in the ability of the probation officer, further noted the probation officer's description of Weneta as a con man and her belief that he would "continue to commit criminal acts if given the slightest opportunity." The Court then sentenced Weneta to an active term of 25 years of incarceration. Explaining its departure from Weneta's guidelines, which called for a sentence of less than six years, the Court noted Weneta's lack of remorse and determined that he posed a serious danger to the community.

Weneta's Claims

16. To succeed on a claim of ineffective assistance of counsel, a petitioner must show both that his attorney's performance was deficient ***and*** that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687 (1984); Friedline v. Commonwealth, 265 Va. 273, 279, 576 S.E.2d 491, 494 (2003).

17. Under first prong of the Strickland test, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. In evaluating counsel's performance, the reviewing court must "indulge a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance." Id. At 689; Darden v. Wainwright, 477 U.S. 168, 186 (1986). Further, the reviewing court must not engage in hindsight; rather, the court must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. Strickland, 466 U.S. at 690.

18. To satisfy the "prejudice" requirement, the petitioner must prove there is a reasonable probability that, but for counsel's supposedly unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Where a petitioner has pled guilty at trial he must, in order to satisfy the "prejudice" requirement, show "there is a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). This is an objective inquiry; dependent on the likely outcome of a trial had the defendant not pleaded guilty. Hill, 474 U.S. at 59-60; Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988); Meyer v. Branker, 506 F.3d 358, 269 (4th Cir. 2007).

19. Since petitioner's burden is two-fold, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice" issue. Strickland, 466 U.S. at 697. "Court should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." Id. Thus, if a court can dismiss an ineffectiveness claim on the ground of

lack of prejudice, the court should do so without scrutinizing counsel's performance. Id.

Claim (a)

20. In claim (a), Weneta contends the prosecutor violated Code §19.2-299 by disclosing his offender's statement from the PSI and argues counsel ineffective for failing to object to the testimony of Michael Weneta based on that alleged violation.[1] The Court finds claim to be without merit.

Disclosure of Weneta's statement did not violate §19.2-299.

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[1] Weneta contends the prosecutor read "sections of the presentence investigation report" to his brother and argues his brother was not a proper recipient of the report. However, Weneta's brother did not receive a copy of the report. Moreover, the prosecutor's disclosure was limited to the Weneta's statement on page 2a of the report – thus disclosure was limited by the scope of counsel's investigation of a particular assertion in the report. Moreover, while Weneta refers to the information contained in his statement as "confidential," he had told a number of people the same story he gave the probation officer in the statement – that he was responsible for the care of his mother. Additionally, Weneta was preparing to further publish information contained in his statement by proffering a letter to this Court in which he attempted to excuse his theft by claiming he had been "charged with the full time care of my mother who had been diagnosed with terminal pancreatic cancer" and that he was "struggling" to pay his own bills and to "cover the shortfalls in her health care coverage." Under these circumstances, the statement was clearly not "confidential."

21. Code § 19.2-299 allows a trial court to direct probation officer to investigate and report on a defendant's history, criminal and otherwise, and all other facts relevant to the Court's determination of the appropriate sentence. § 19.2-299(A). The statute requires the probation officer to submit the report (PSI) to the Court, the prosecutor, and counsel for the defendant in a timely manner – counsel must receive copies at least five days before sentencing. The recipients are required to keep the report confidential. The statute requires the probation officer to be "available to testify from [the] report in open court" and gives the defendant the right to cross-examine the probation officer as to the report's contents. § 19.2-299(A).

22. While the express wording of the statute requires recipients to keep the report ***itself*** confidential, it does not contemplate that every fact or claim made therein will be protected from independent verification or will somehow be forever protected from revelation. Clearly, the statute contemplates that counsel for both parties should review the report and have an opportunity to investigate the information provided therein in advance of sentencing – thus the requirement that the report be provided to counsel at least five days prior to sentencing and the provision allowing for cross-examination of the probation officer as to the report's contents. Indeed, that the legislature clearly did not contemplate unlimited protection of the facts contained in the report is clear from the statute's requirement that the probation officer be available

to testify to the contents of the report "in open court." § 19.2-299(A).[2]

23. Under Weneta's interpretation of the statute, counsel for the defendant would not be able to argue in open court that portions of the report are incorrect, because to do so would necessarily reveal the contested portions of the report, in violation of the statute. Similarly, a trial judge would not be permitted to state in open court, as was done in this case, that it was relying on (or even taking into consideration) specific elements of the report in making its sentencing determination, unless the judge could do so without revealing what those elements were. Such an interpretation of the statute would lead to absurd results, in violation of the rules

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[2] In support of his interpretation of § 19.2-299, Weneta has proffered an affidavit from Carlos Wall, an attorney employed by the same firm as habeas counsel. Mr. Wall's affidavit will not be considered by this Court. The affidavit consists of hearsay relating an expert opinion on a question of law – whether the prosecutor violated the statute. Neither hearsay affidavits nor affidavits purporting to provide an expert opinion on a question of law are admissible in habeas. See Brown v. Corbin, 244 Va. 528, 531, 423 S.E.2d 176, 178 (1992) (expert testimony not admissible where person of ordinary intelligence capable of reaching own conclusion); Cf. Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (where issue is question of law to be decided by court, affidavits offering expert opinion on matter are not relevant); Kearns v. Hall, 197 Va. 736, 741, 91 S.E.2d 648 (1956) (affidavit of attorney setting forth what others had said not evidence; statement of what others said is mere hearsay); Burket v. Angelone, 208 F.3d 172, 186 (4th Cir. 2000) (holding Virginia Supreme Court's decision to strike two affidavits, one unexecuted and the other comprised of inadmissible hearsay, was not erroneous).

of statutory construction. See Jones v. Conwell, 227 Va. 176, 180-81, 314 S.E.2d 61, 64 (1984). Weneta's claim that the prosecutor violated §19.2-299 is without merit and counsel was not deficient for failure to argue otherwise. See Cromwell v. Commonwealth, 232 Va. 454, 470, 352 S.E.2d 352, 361 (1987) (counsel not ineffective for failing to make meritless objection); Moody v. Polk, 408 F.3d 141, 151 (2005) (citing Murray v. Maggio, 736 F.2d 279, 283 (5th Cir. 1984) (counsel not required to file futile motions)); Washington v Murray, 952 F.2d 1472, 1481 (4th Cir. 1991) (no ineffective assistance where counsel failed to object to admissible evidence).

Suppression would not have been a proper remedy for any violation of §19.2-299.

24. Even were Weneta correct in his interpretation of §19.2-299, the court finds counsel was not ineffective for failing to argue for suppression of Michael Weneta's testimony as the proper remedy for the alleged violation. Section 19.2-299 does not provide for any remedy for a violation of it confidentiality provisions, nor does the statute implicate any constitutional right, the violation of which would require suppression. Moreover, mere violation of a state statute does not, itself, implicate the constitution or require suppression. See Virginia v. Moore, 553 U.S. ___ 061082, 128 S. Ct. 1598 (April 23, 2008) (refusing to extend Fourth Amendment protections to a violation of state law where the arrest itself was constitutional).

25. Because Michael Weneta's testimony was not subject to suppression under the statute or constitution, its admission fell within the broad discretion of the trial court and was merely subject to the general requirements that it be relevant and not precluded by a specific rule. See McCarter v. Commonwealth, 38 Va. App. 502, 504-06, 566 S.E.2d 868, 869-70 (2002) (citation omitted) (stating rule); Blain v. Commonwealth, 7 Va. App. 10, 16, 371 S.E.2d 838, 842 (1988) (stating standard of review). Under the circumstances, Weneta simply cannot show the trial court would have exercised its discretion to suppress Michael Weneta's testimony.

26. Weneta was attempting to perpetrate a fraud on the Court through his statement to the probation officer. In that statement he sought to excuse his criminal activities — embezzling approximately $7,500 a month for eight months from his employer — by claiming the money was necessary to cover his mother's medical expenses. Weneta further sought to excuse his behavior by eliciting sympathy for his mother's illness and subsequent death and for his struggle to care for her in her last days. In truth, Weneta did not steal from his employer to cover his mother's expenses. Michael Weneta's testimony exposed this fraud.[3] Notably, the

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[3] Weneta contends that to allowing Michael Weneta's testimony perverted the purpose of the investigation report,

Court has held that even in the case of a constitutional violation, evidence obtained thereby may be used for impeachment. See, e.g., Harris v. New York, 401 U.S. 222 Supreme (1971) (statement obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966)); United States v. Havens, 446 U.S. 620 (1980) (evidence obtained in violation of Fourth Amendment); Oregon v. Haas, 420 U.S. 714 (1975) (statement obtained in violation of Miranda). These cases recognize the primary goal of the criminal justice system is "a search for truth," Haas, 420 U.S. at 722, and permitting a defendant to use a rule designed to protect his rights to thwart that goal is unacceptable. Id.; Harris, 401 U.S. at 226.

27. In addition to exposing Weneta's deceitful attempt to excuse his crimes and gain sympathy for the fraud it was, Michael Weneta's testimony was relevant to Weneta's remorse, the likelihood of his rehabilitation, and his future dangerousness, all factors relevant to the sentencing determination. See Merritt v. Commonwealth, 32 Va. App. 506, 508, 528 S.E.2d 743, 744 (2000) (noting factors relevant to sentencing determination); see also United States v. Dunnigan, 507 U.S. 87, 97-98 (1993) ("It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process.").

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which, he correctly notes, is to aid the trial court in determining a just sentence. Manifestly, this was not the case.

28. Clearly, suppression of Michael Weneta's testimony was neither a required nor an appropriate remedy for any violation of the confidentiality provision of § 19.2-299. Counsel was not ineffective for failing to argue otherwise. See Correll, 232 Va. at 470, 352 S.E.2d at 361; Moody, 408 F.3d at 151; Murray, 952 F.2d at 1481. This claim will therefore be dismissed.

Claim (b)

29. Weneta next contends his attorney was ineffective for failing to object to the testimony of Michael Weneta and Eve Butler-Gee as irrelevant. The Court finds this claim to be without merit.

30. As set forth more fully in above, Michael Weneta's testimony was relevant to expose Weneta's fraud, to his remorse, or lack thereof, the likelihood of his rehabilitation, and his future dangerousness, all factors relevant to the sentencing determination. Butler-Gee's testimony was largely confined to describing Mary Ann Weneta's illness and the care given to her by her friends, Butler-Gee among them, and professionals. Butler-Gee's testimony was relevant because it exposed Weneta's fraudulent claim that he had been caring for his mother constantly from August 2003 until her death in March 2004. It helped to refute his meritless bid for sympathy from the trial court and to expose him as a liar with no remorse, all facts relevant to the trial

court's sentencing determination.[4]

31. Weneta also contends the testimony of Michael Weneta and Butler-Gee was unduly prejudicial. As previously stated, the determination of admissibility of relevant evidence is within the sound discretion of the trial court. To "exercise that discretion, the trial court must weigh the relevance and probative value of the evidence against its potential undue prejudice to the defendant." Beck v. Commonwealth, 253 Va. 373, 385, 484 S.E.2d 898, 906 (1997).

32. The prejudice that must be weighed is not the natural tendency of relevant evidence to be detrimental to one side or the other, but the possibility it will irrationally inflame or mislead. See Powell v. Commonwealth, 267 Va. 107, 141, 590 S.E.2d 537, 558 (2004) ("All evidence tending to

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[4] Weneta contends that, to be relevant at sentencing, evidence must have a "nexus" with "the statement of facts in the criminal case itself." Weneta cites no authority to support this contention, and it is plainly without merit. "[T]he sentencing decision . . . is a quest for a sentence that best effectuates the criminal justice system's goals of deterrence (general and specific), incapacitation, retribution and rehabilitation." Merritt, 32 Va. App. at 508, 528 S.E.2d at 744. Thus, facts that are irrelevant and inadmissible at trial are relevant and admissible at sentencing. For example, criminal history, which is plainly relevant to sentencing, see § 19.2-299, is generally irrelevant to guilt or innocence. See Kirkpatrick v. Commonwealth, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970).

prove guilt is prejudicial to an accused, but the mere fact that such evidence is powerful because it accurately depicts the gravity and atrociousness of the crime or the callous nature of the defendant does not thereby render it inadmissible."). However, "[a] judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both." Beck, 253 Va. at 385, 484 S.E.2d at 906. Moreover, "[t]rial judges are also presumed to have considered the presented evidence only in its permissible context." Breeden v. Commonwealth, 43 Va. App. 169, 188, 596 S.E.2d 563, 572 (2004) (citation omitted).

33. Here, Weneta has not shown the objected to testimony was improperly prejudicial. Indeed, it is clear it prejudicial only in that it proved Weneta's true character, enabling the trial court to accurately assess his remorse, future dangerousness, and the likelihood of his rehabilitation. Moreover, Weneta had not even attempted to overcome the presumption that the trial judge considered the testimony only "in its permissible context." Breeden, 43 Va. App. at 188, 596 S.E.2d at 572. Under these circumstances, Weneta has failed to meet his burden to show counsel was deficient for failing to object the testimony as irrelevant or unduly prejudicial, or to show resulting prejudice. This claim will therefore be dismissed.

Claim (c)

34. In claim (c), Weneta contends counsel was ineffective for failing to impeach his uncle, Michael Boyd. This claim is without merit.

35. Weneta contends counsel should have confronted Boyd with the following:

> a. Although Boyd said he wanted to help Weneta, he:
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> > i. reported Weneta's criminal history to his employer;
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> > ii. sent Weneta letters calling him his enemy;
> >
> > iii. asked that Weneta receive a substantial sentence;
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> b. Boyd's statement that Weneta's parents had failed to punish him for wrongdoing was incorrect — they had actually pressed charges against Weneta on several occasions;
>
> > c. Boyd's claim that Weneta was a gambler was untrue, instead Weneta had only once been in a casino;
> >
> > d. Although Boyd claimed Weneta stole from many people, he would have been unable to name anyone Weneta stole from that the Court was not already aware of;

e. Boyd had been a city councilman, but had been forced to resign that position 20 years earlier amid charges of misconduct;

f. Boyd had manipulated and threatened witnesses who could have helped Weneta; and

g. Boyd "despised" Weneta because Weneta disclosed to his family the role Boyd played in an affair that his mother had and once told Jackie Ballew that he wished Weneta had been aborted.

36. As to Weneta's claim his attorney should have impeached Boyd by challenging his desire to help Weneta, Boyd's letter made clear that he believed Weneta was incapable of stopping himself from stealing and that he would eventually come to physical harm if he was not stopped. Thus, his desire to help Weneta was not, under the circumstances, incompatible with his turning Weneta in to his employer or his asking for a lengthy sentence, as Weneta claims. Further, Weneta offers no support for his self-serving claim that Boyd had sent him letters calling him his enemy. Weneta's attorney was not ineffective for failing to challenge Boyd with such a groundless claim.

37. Weneta's claim that his attorney should have impeached Boyd by pointing out that his parents had pressed charges against him is similarly

without merit. Boyd never suggested his parents had never held him accountable for his thievery. Instead, he wrote in his letter that Mary Ann "interceded with authorities [on his behalf] whenever she could until she could no longer withstand the personal pain Shawn inflicted on her." Clearly, even Weneta's mother at some point agreed Weneta had to he held accountable and Boyd's letter says as much. Thus, it is not inconsistent with Weneta's claim that his parents had pressed charges against him at some point. Moreover, Weneta has provided no support for his claim that his parents pressed charges against him. Under these circumstances, Weneta has simply not met his burden to show counsel was deficient for failing to impeach Boyd in this manner or to show resulting prejudice.

38. Weneta's claim that he had only been in a casino once in his life and thus was not a gambler as his uncle alleged is unsupported by any evidence, as is his claim that his uncle was forced to resign from his position as city councilman.[5] Counsel was not deficient for failing to attempt to impeach Boyd with baseless accusations.

39. Weneta's claim that his attorney was

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[5] Even if supported by admissible evidence, Weneta's claim that counsel should have impeached Boyd by accusing him of having been forced to resign is without merit. A witness may not be impeached by collateral evidence of prior-bad acts. See Stottlemyer v. Ghramm, 268 Va. 7, 12, 597 S.E.2d 191, 194 (2004).

ineffective for failing to impeach Boyd by challenging him to name any one he had stolen from with whom the judge was not already familiar is also without merit. First, given that Weneta's criminal history included a multitude of theft charges beginning when Weneta was only 13 years old, Weneta simply cannot show Boyd's statement that Weneta had stolen from many, many people influenced the trial court or that impeaching Boyd on that particular point would have influenced the outcome at sentencing.

40. Moreover, Weneta's own exhibit shows that he stole twice from friends who had offered him shelter after his own family had given up on him and that he twice ran away when caught, rather than face the consequences of his actions. Indeed, had counsel attempted to impeach Boyd by challenging him to name individuals Weneta had stolen from, it is just as likely Boyd would have been able to provide a long list, much to Weneta's detriment. Under these circumstances, Weneta has not met his burden to show counsel was deficient for failing to impeach Boyd in this manner, nor has he met his burden to show resulting prejudice.

41. Finally, Weneta's claim counsel should have impeached Boyd by accusing him of "manipulating" and "threatening" witnesses is also without merit. First, the only witness Weneta actually identifies is Jackie Ballew. Ballew has signed a letter for Weneta in which she states that Boyd did not want her to testify for Weneta because he believed she would commit perjury. She says that if Weneta's attorney had promised to have "protected" her from having to

face Weneta's brothers and Boyd, she would have been willing to testify at Weneta's sentencing.

42. First, by expressing concern that Ballew, who makes clear in her letter her fondness of Weneta, despite knowing him to be a thief, might perjure herself, Boyd neither "threatened" nor "manipulated" Ballew. Second, Ballew does not allege her timidity at facing Weneta's family at sentencing stems from any threats or manipulation. Moreover, it is just as likely Ballew's timidity stemmed from her knowledge of the harm Weneta had done to himself and his family — indeed, she concedes she believes Weneta "should be punished and in jail for his wrongdoings" — and her discomfort at facing that family to testify that Weneta, although he repeatedly stole from his mother, was a kind and loving son.[6] In short, Weneta has failed to provide any support for his self-serving allegation the Boyd was "manipulating" and "threatening" witnesses. He therefore cannot show counsel was ineffective for failing to make baseless allegations in an effort to impeach Boyd.

43. Finally, Weneta contends counsel was ineffective for failing to impeach Boyd by accusing

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[6] When Attorney Dennis asked Ballew to testify on Weneta's behalf, she indicated she felt uncomfortable about doing so and indicated her feelings stemmed partly from the fact that she "felt differently" about Weneta than his family members and other witnesses.

him of disliking Weneta for disclosing to the family Boyd's "role" "in an affair of his mother," and telling Jackie Ballew that he wished Weneta had been aborted. Weneta, however, provides no support for these self-serving allegations against his uncle. Indeed, nowhere in Ballew's letter does she indicate Boyd ever said any such thing. Moreover, Weneta's allegation is inconsistent with his statement to his counselor that ***he resented his uncle*** for facilitating his mother's affair and the claim he made to Andrea LoMonaco that he caught his uncle having an affair and told his mother, for which his uncle resented him. Once again, Weneta's attorney was not ineffective for failing to challenge Boyd with such groundless accusations.[7]

Claim (d)

44. In claim (d), Weneta contends his attorney was ineffective for failing to contact and subpoena for sentencing several witnesses. This claim is without merit.

45. First, although Weneta alleges counsel failed to investigate any of the potential witnesses on

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[7] Attorney Dennis states in his affidavit that he did attempt to impeach Boyd, but decided, when his attempts proved unsuccessful, to forgo further efforts and instead focus on the offense for which Weneta had been convicted, rather than Weneta's family problems. This choice represented a reasonable tactical decision, this Court will not second guess in habeas. See United States v. Clayborne, 509 F.2d 473, 479 (4th Cir. 1974) ("knowing when not to cross-examine an adverse witness is the art of cross-examination at its highest").

the lists that Weneta provided him, counsel avers that he did contact Weneta's potential witnesses. Many of those witnesses proved they would not have been willing or able to assist Weneta. One, Deputy Baily, did not even remember Weneta. Another, Ms. Gullett, indicated Weneta had stolen repeatedly from his mother and had only cooked one meal for her in nearly a year. A third, Ms. Smith, told counsel Weneta deserved "what's coming to him." Counsel also contacted Elizabeth Hedley, who was on one of Weneta's witness lists. Ms. Hedley indicated "she would have absolutely nothing, nothing to say on behalf of" Weneta. Two of the witnesses Weneta contends counsel was ineffective for failing to contact and subpoena for sentencing, Kristopher Sampson and Chris Latta, were not on Weneta's potential lists. Moreover, Sampson and another potential witness, Michael Penderson had only known Weneta for about three years and had met at a concert. Further, Sampson had previously provided Weneta with a letter for the trial court in an earlier, unrelated case, in which he noted Weneta's "sincere and honest desire to change his life and become a productive member of society." Clearly, given Weneta's subsequent embezzlement from his employer and escape from custody, Sampson was either insincere or grossly mistaken about Weneta's willingness to change, and that fact would have been apparent if he had testified. Counsel did not believe, under the circumstances, testimony from these witnesses could be very helpful to Weneta.

46. Counsel's decision not to press these witnesses to testify on Weneta's behalf should not be second guessed in habeas. Indeed, the choice of

which witnesses to call is generally a matter of trial tactics, consigned to the judgment of counsel, not the defendant, and as to which counsel's tactical judgments will seldom be overridden in habeas corpus review. See, e.g., Johnson v. Riddle, 222 Va. 428, 433, 281 S.E.2d 843 (1981); Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977). "[A] tactical decision not to call a particular witness, if made after adequate investigation and based upon counsel's reasonable determination that damage to his client's case can thereby be avoided, cannot form the basis for a finding of ineffective assistance of counsel." United States v. Weaver, 882 F.2d 1128, 1139-40 (7th Cir. 1989).

47. Further, one of the potential witnesses, Jackie Ballew, expressed extreme reluctance when asked to testify on Weneta's behalf. As counsel notes in his affidavit, requiring a reluctant witness to testify could result in "unreliable" testimony. Indeed, Ballew notes in the letter she provided to Weneta for this habeas petition that she believed he deserved to be punished. She also notes that she was aware Weneta had stolen from his mother in the past and that she had been "devastated" by his behavior. Under the circumstances, this Court will not second guess counsel's tactical decision not to subpoena Ballew to testify. Moreover, although counsel secured promises from two of Weneta's potential witnesses that they would appear for his sentencing, they failed to do so.

48. In support of this claim, Weneta has proffered several letters and affidavits. However,

four of these exhibits, those from Johnny Moseley, Dani Alvestad, Bill Loukas, and Chris Latta, are either not signed, not notarized, and thus not made under penalty of perjury, or both. For that reason, they will not be considered by the Court.

49. Moreover, while several affiants contend Weneta cared for his mother in some manner during her illness, none of them indicate the period of time in which that occurred.[8] They thus do not contradict the testimony of Michael Weneta and Butler-Gee that Weneta was not taking care of his mother from August 2003 to her death in March 2004 and thus do not support Weneta's attempt to excuse his theft from his employer during that time. Moreover, none of the affiants indicate they had any personal knowledge to dispute Michael Weneta's testimony that Weneta was asked to leave his mother's home because he was stealing from her. Nor do they bring into question Michael Weneta's testimony that his mother's medical bills were adequately covered by her insurance and thus they do not support Weneta's claim that he stole the money to pay her medical bills. Indeed, none of these exhibits show Weneta was in any way remorseful, open to rehabilitation, or likely not to commit future crimes.

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[8] Indeed, even Ballew, who is clearly fond of Weneta, only claims that when Shawn got out of jail he sometimes cooked for his mother, bought her roses on her birthday and, according to his mother, occasionally drove her around for pleasure or to shop. Clearly, Ballew's affidavit does not support Weneta's claim that he was caring for his mother day and night while trying to hold down a full time job and that he did so until her death.

50. Additionally, although Weneta contends several witnesses, had counsel called them to testify on his behalf, would have testified about Boyd's alleged "vendetta against Weneta," none of the witnesses whose letters and affidavits Weneta has provided proffer any first-hand knowledge of the source of the rift between Weneta and Boyd. Counsel was not deficient for failing to attempt to present inadmissible hearsay evidence.

51. Moreover, many of these witnesses, had they testified as their affidavits suggest, would have actively harmed Weneta. Several portray Weneta as a fun-loving person, able to party and travel while his mother was dying. Indeed, Kelly Miler, Michael Pedersen, Dani Alestad, Andrea LoMonaco, Chris Latta, and Kris Sampson, indicate Weneta traveled extensively during his mother's battle with cancer, although he was supposedly spending all of his time caring for her. According to Weneta's witnesses, Weneta traveled to Colorado in 2003. While there, he gave Kelly Miller money to help her pay her bills — a gift likely subsidized by his theft from his mother and his employer — at a time when he claimed to be struggling to pay his living expenses and his mother's medical bills.

52. Weneta also traveled to Illinois in 2003, where he stayed for three weeks, hanging out with friends and building a bar in Michael Pedersen's back yard. He also traveled to New Jersey and, in November 2003, just months before his mother's death, spent Thanksgiving with his friend Andrea LoMonaco and her family. Finally, he gave Michael

Pedersen $1,500 in 2005, when he was either in jail awaiting trial or during his escape from custody, even though he undoubtedly knew he would be required to repay his employer over $60,000 he had embezzled, and contrary to his claim that he embezzled that money pay his mother's medical bills and intended to pay the money back as soon as he was able.

53. Under these circumstances, Weneta has failed to show that his attorney was deficient for failing to call these witnesses to testify on his behalf at sentencing. See Morrisette V. Warden, 270 Va. 188, 194, 613 S.E.2d 551, 557 (2005) (holding petitioner failed to show ineffective assistance for failure to call witnesses where affidavits in support of claim included inadmissible hearsay evidence, were inconsistent with petitioner's trial strategy, and could have harmed petitioner by showing he lied to police). Further, he has not met his burden to show resulting prejudice — that is, a reasonable probability of a different outcome had counsel presented these witnesses. Indeed, to do so would more likely have prejudiced Weneta. See Moody, 408 F.3d at 152 (acknowledging some evidence is double-edged, in that it may be "viewed as either supporting or detracting from the mitigating circumstances" and that counsel is not ineffective for choosing not to present such evidence); Lewis v. Warden, 274 Va. 93,

116, 645 S.E.2d 492, 505 (2007) (same).[9] This claim will therefore be dismissed.

Claim (e)

54. In claim (e), Weneta contends counsel was ineffective for failing to proffer medical records from his treatment by Dr. David Letiecq. This claim is without merit.

55. Weneta contends the medical records show that when he embezzled from his employer, he was stressed by the responsibility of caring for his terminally ill mother and having to quit his job to care for her. He further contends the records show mitigating evidence that his childhood was difficult and his relationship with his brothers strained. However, as the records indicate, these were claims Weneta made to Dr. Letiecq, not evidence independently uncovered by the doctor. As counsel notes in his affidavit, had the records been

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[9] Indeed, it is clear Weneta was prejudiced, not by counsel, but by his own actions in lying to the probation officer. Under the circumstances, not even the most proficient of attorneys could have extracted Weneta from the hole he had dug for himself. See Meyer v. Branker, 506 F.3d 358, 370 (4th Cir. 2007) (noting that "sometimes it is the nature of the evidence, rather than the acts of the lawyer, that "prejudice" the defendant," and that "[a]t some point, even the most brilliant attorney will be unable to prevent [a negative] outcome.").

submitted, the trial court could have seen them as self-serving and, as such, they would not likely have been helpful to Weneta.

56. In addition, the records show Weneta reported to his doctor that he had repeatedly stolen from friends who had provided him with a place to live. The records further show Weneta, despite having been ordered to obtain mental health counseling as a condition of his Fairfax County probation, repeatedly failed to attend appointments, was either late for or canceled others, and was eventually terminated for non-compliance. Thus, the records present further evidence of Weneta's long history of theft and show his lack of interest in rehabilitation, factors that could have negatively affected the trial court's sentencing decision. Under the circumstances, Weneta has not shown counsel's tactical decision not to submit the records was deficient, or that he was prejudiced thereby. See Moody, 408 F.3d at 152; Lewis, 274 Va. at 116, 645 S.E.2d at 505. This claim will therefore be dismissed.

Claim (f)

57. In claim (f), Weneta contends counsel was ineffective for failing to help him craft a better statement to the trial court at sentencing. Weneta contends counsel should have advised him to admit his crimes and say that he was remorseful and not to ask the court for another chance. The Court finds this claim to be without merit.

58. Weneta essentially asks this Court to hold

that his lawyer had a professional obligation to advise him to be less than candid in statements he made to the trial court. Weneta had no right to have his lawyer coach him to perjure himself or mislead the trial court in any way. See Nix v. Whiteside, 475 U.S. 157, 158 (1986) (Counsel's duty to client "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth," and "counsel is precluded from . . . assisting the client in presenting false evidence or otherwise violating the law"); Georgia v. McCollum, 505 U.S. 42, 58 (1992) (noting "[d]efense counsel is limited to 'legitimate, lawful conduct.'") (citation omitted); Mathews v. United States, 485 U.S. 58, 71 (1988) ("We have rejected before the notion that a defendant has a right to lie at trial, or a right to solicit his attorney's aid in executing such a defense strategy.").

59. Moreover, the sole claim of prejudice he makes is that his sentence was accurately fixed by a trial judge who perceived his lack of remorse and sentenced him accordingly, and that he did not receive the windfall of a lower sentence he might have obtained by misleading the trial judge. The absence of such a windfall is not constitutionally cognizable prejudice under Strickland. See Lockhart v. Fretwell, 506 U.S. 364, 368-371 (1993) (finding no Strickland prejudice where "the result of the sentencing proceeding . . . was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure to "object, because [t]o hold otherwise would grant criminal defendants a windfall to which they are not entitled."). Because Weneta has shown neither deficient performance nor resulting prejudice, this claim will be dismissed.

CONCLUSION

The Court thus is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore, **ADJUDGED** and **ORDERED** that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed.

The Clerk is directed to forward a certified copy of this Order to Jonathan Sheldon, Esquire, counsel for the petitioner, the respondent, and Josephine F. Whalen, Assistant Attorney General.

Enter this 19th day of June, 2009.

/s/
Judge

I ask for this:

/s/
Josephine F. Whalen
Assistant Attorney General II

Seen and objected to: ----------→ Because many of the facts asserted herein by the Warden are in dispute and thus cannot be determined in the Warden's favor without a hearing. Va. Code § 8.01-273; Grossman v. Saunders, 237 Va. 113, 119 (1989) The specific disputes are too lengthy to detail here, but will be detailed in a separate pleading, filed herewith.

_____/s/_____6/3/09
Jonathan Sheldon, Esquire
Counsel for Petitioner

SEAL

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3rd day of June, 2010.

Shawn R. Weneta, Appellant,

against Record No. 091920
Circuit Court No. CL08-1305

Warden of the Lawrenceville Correctional Center, Appellee.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Justice Mims took no part in the consideration of this case.

A Copy, Teste:

Patricia L. Harrington, Clerk

By:

_____/s/_____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 24th day of September, 2010.

Shawn R. Weneta, Appellant,

against Record No. 091920
Circuit Court No. CL08-1305

Warden of the Lawrenceville Correctional Center, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 3rd day of June, 2010 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Mims took no part in the consideration of this case.

A Copy, Teste:

Patricia L. Harrington, Clerk

By:

_____/s/_____
Deputy Clerk